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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 466.

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Will of WILLIAM H. PORTER, Deceased,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONERS.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statute Involved	2
Statement	3
Specification of Error	6
Summary of Argument	7

ARGUMENT AS TO CONSTRUCTION:

I. The tax is laid upon the transfer of the net estate of the decedent at death. It is not laid upon the extinguishment of a limited power 10

II. The value of the property previously transferred should not be included in the estate transferred at death 12

III. The wording of Section 302(d) is peculiarly susceptible of the construction applied to Section 302(c) in *Reinecke* v. *Northern Trust Company*. Such a construction avoids arbitrary and unreasonable results, which are the inevitable consequences of the contention of the Government 21

ARGUMENT AS TO CONSTITUTIONALITY:

PAGE

IV. As applied to the transfers in this case, Section 302(d) would be confiscatory and unconstitutional, if construed as the Government contends 28

IRREVOCABILITY OF THE TRUSTS:

V. Each of the original trusts was irrevocable as and when made. The attempt to revoke trusts 1 and 2 was therefore ineffectual for that purpose. The indenture of November 27, 1926 therefore accomplished no transfer. Section 302(c) of the Act has no application 34

CONCLUSION 35

CITATIONS.

Cases:

Brady v. *Ham*, 45 Fed. (2nd), 454 ..... 8, 23
Bullen v. *Wisconsin*, 240 U. S. 625 22
Burnet v. *Northern Trust Co.*, 283 U. S. 782.... 21
Chase Nat'l Bank v. *United States*, 278 U. S. 327.....7, 8, 11, 14, 16, 17, 21, 28
Cover v. *Burnet*, 53 Fed. (2nd) 915 ..... 8, 26
Dickey v. *Goldschmidt*, N. Y. 60 Misc. 258 34
Garner v. *Germania Life Insurance Co.*, 110 N. Y. 266 34
Heiner v. *Donnan*, 285 U. S. 312 ..... 7, 9, 11, 28, 29, 30, 31, 33
Hoeper v. *Tax Commission*, 284 U. S. 206..... 28

PAGE

Knowlton v. *Moore*, 178 U. S. 41 ..... 8, 29

Levett v. *Farnham*, 169 Mass. 1 34

May v. *Heiner*, 281 U. S. 238.....15, 17, 21, 29
McPherson v. *Rollins*, 107 N. Y. 316 34
Milliken v. *United States*, 283 U. S. 15..... 32

Nearpass v. *Newman*, 106 N. Y. 47 34
Nichols v. *Coolidge*, 274 U. S. 531 ..... 7, 8, 9, 11, 21, 29, 30, 32, 33

Reinecke v. *Northern Trust Co.*, 278 U. S. 339..7, 8, 10, 12, 14, 15, 16, 17, 20, 21, 27, 29, 30, 32, 35
Roberts v. *Taylor*, 300 Fed. 257 34

Tyler v. *United States*, 281 U. S. 497....7, 11, 15, 17, 29

Untermyer v. *Anderson*, 276 U. S. 440 32

White v. *Erskine*, 47 Fed. (2nd) 1014 ..... 11, 25

Text Writers:

Bispham, Equity 20
Sugden, Powers 22

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Opinion Below.

The opinion in this cause of the Circuit Court of Appeals (R., 111) is reported in volume 60 Federal Reporter (Second Series), at page 673 *et seq.* The opinion of the Board of Tax Appeals is reported in 23 B. T. A. 1016.

Jurisdiction.

The decree of the Circuit Court of Appeals for the Second Circuit was entered July 26, 1932 (R., 116). The petition for certiorari was filed October 24, 1932. Certiorari was granted November 14, 1932 (R., 117). The jurisdiction of this court is based upon section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statute Involved.

The statute of the United States concerned is section 302(d) of the Revenue Act of 1926, providing as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * *
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;
>
> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished

any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title."

This is a case contesting the validity of a tax imposed by the Commissioner of Internal Revenue under the Estate Tax Law, and, specifically, the provision thereof last above quoted.

Statement.

The estate concerned is that of William H. Porter, who died November 30, 1926, resident in New York (R., 44). The petitioners are his executors (R., 44).

On October 18, 1918, the decedent transferred $100,000 in securities in trust to Bankers Trust Company for his daughter and her son (Petition, Exhibit B, R., 44). This is designated "Trust No. 1" in the findings (R., 44). On the same day he transferred a like amount to the same trustee for his son and the son's daughter (Respondent's Exhibit A, R., 91-97). This is designated "Jamie Porter Trust No. 1" in the findings (R., 47). On February 1, 1919, he created a third trust with the same trustee comprising $100,000 in securities for his daughter and her son mentioned above (R., 44-45). This is designated "Trust No. 2" in the findings (R., 45). On June 27, 1919, he created with the same trustee a fourth trust of like value, for

his son's daughter (Respondent's Exhibit B, R., 98-104). This is designated "Jamie Porter Trust No. 2" in the findings (R., 48). The petition, with its exhibits, is in evidence (R., 2-37).

The findings set forth the substance of the beneficial provisions of the several instruments creating these trusts (R., 44-49). All four of them dispose of all interests in the property affected, and they are in their provisions ordinary trust conveyances. Each contains the following provision (R., 45, 46):

> "TENTH: Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

After these four trusts were created, the decedent's daughter had two more children (R., 46). The decedent decided that he wished to include them with their elder brother in the benefits of Trusts Nos. 1 and 2 (R., 46). He undertook to do this by attempting to revoke Trusts Nos. 1 and 2, as if the reserved power enabled him to revoke. He delivered to the trustee two instruments, one for each trust (Nos. 1 and 2) as follows (R., 46):

> "Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received but not as yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you as you would have treated that income under the trust which I now revoke.
>
> Very truly yours,
>
> (Signed) Wm. H. Porter (seal)

"State of New York)
County of New York) ss.:

> "On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.
>
> (Signed) James J. McDermott."

At the same time or immediately thereafter on the same day the decedent delivered a new trust deed to the same trustee purporting to grant all of the same property comprised by Trusts Nos. 1 and 2, and nothing else, upon trusts for his daughter and all three of her children (R.,

46, 47). This new instrument, called "Trust No. 3" in the findings (R., 47), was similar to its predecessors and contained *verbatim* the same reservation of power quoted above (R., 47). Although there is no finding on the subject, the proof is that the trustee did not redeliver any part of the trust corpus to the decedent, but retained possession throughout (R., 81) and would have refused to part with it if requested (R., 81).

The decedent died November 30, 1926 (R., 44).

Obviously the power did not admit of revocation and therefore the last-mentioned purported transfer was at most a modification, as is urged under our Point V, at page 34, *infra.*

None of these transfers was made in contemplation of death. This is expressly found as to the 1926 transaction (R., 47) and as to Trusts Nos. 1 and 2 (R., 46). There is no finding either way as to the Jamie Porter Trusts Nos. 1 and 2, but both were made more than seven years before death, and no attempt was ever made to alter or amend either of them.

Specification of Error.

The error intended to be urged is:

> That the court below erred in holding that section 302(d) of the Revenue Act of 1926 requires inclusion in the gross estate of the decedent of the value of the property included in the trusts mentioned in the ~~petition~~ before the United States Board of Tax Appeals (R., pages 2-10).

The errors assigned before the Circuit Court of Appeals are set out in the Record (pages 70-72).

SUMMARY OF ARGUMENT.

Argument as to Construction.

I. The tax is laid upon the transfer of the net estate of the decedent at death. It is not laid upon the extinguishment of a limited power. *Reinecke* v. *Northern Trust Co.* (278 U. S. 339); *Chase National Bank* v. *United States* (278 U. S. 327); *Tyler* v. *United States* (281 U. S. 497); *Nichols* v. *Coolidge* (274 U. S. 531); *Heiner* v. *Donnan* (285 U. S. 312).

II. Section 302(d) should not be construed as including the value of the property previously transferred in the net estate at death.

The decedent had divested himself of all title and interest in 1918 and 1919. He could not revoke the instruments or recover the property or regain the use or enjoyment of it. He reserved power to alter or modify the trusts but expressly provided against the exercise of this power for the benefit of himself or his estate. When the gifts were made the property ceased to be a part of his estate and could not be brought back into it.

Sections 302(c) and 302(d) perform the same function and serve as measuring rods of what is to be included in the net estate, which is taxed under Section 301. The construction applied to Section 302(c) in *Reinecke* v. *Northern Trust Co.* should be applied to Section 302(d) in this case. Under this construction, property to be included in the gross estate must be property passing from the possession, enjoyment or control of the decedent at his death. There must be a shifting of an economic interest from the dead to the living, or of control for his own benefit. There was no such shifting in this case. The decedent by the original transfers had divested himself of all title and interest. He could not recall or repossess the property or its enjoyment for himself or his estate. At his death, all the interests

remained precisely as they were before death, except for the fact that the interests of the beneficiaries could no longer be disturbed. That fact may have enhanced *their* value but is immaterial here because this is not a succession tax. *Knowlton* v. *Moore* (178 U. S. 41); *Nichols* v. *Coolidge; Chase National Bank* v. *United States; Reinecke* v. *Northern Trust Co.*

III. The wording of Section 302(d) is peculiarly susceptible of the construction applied to Section 302(c) in the *Reinecke* case. Such a construction avoids arbitrary and unreasonable results, which are the inevitable consequence of the contention of the Government.

The words "any change" should be given a reasonable meaning. If they be held to mean "any change however slight", large amounts of tax would be made to depend upon some trivial or inconsequential change. If, however, they mean "any change without limitation", then the provision contemplates any change which the donor chooses to make, including one for his own benefit. The latter meaning would imply a control for himself of economic benefit (*Reinecke* v. *Northern Trust Co.; Chase National Bank* v. *United States*). That this is the meaning intended by Congress is evidenced by the Report of the Ways and Means Committee, which cited Section 302(d) as being in accord with the provision of the Income Tax Law relating to *revocable* trusts. It is further borne out by the association of the words "alter" and "amend" with the word "revoke" ("power to alter, amend or *revoke*"). The reasonable and logical construction therefore is that Section 302(d) refers to a power sufficiently unlimited that the donor might have taken advantage of it for his own benefit.

Until the decision in this case, this was the construction uniformly adopted by the Appellate Courts. (*Brady* v. *Ham*, 45 Fed. [2nd] 454; *Erskine* v. *White*, 47 Fed. [2nd] 1014; *Cover* v. *Burnet*, 53 Fed. [2nd] 915). The contrary construction would make the tax depend on trivial considerations and lead to arbitrary and unreasonable results.

ARGUMENT AS TO CONSTITUTIONALITY.

IV. As applied to the transfers in this case, Section 302(d) would be confiscatory and unconstitutional, if construed as the Government contends.

Taxation of one person's property by reference to the property of another is unconstitutional. *Hoeper* v. *Tax Commissioner* (284 U. S. 206); *Heiner* v. *Donnan* (285 U. S. 312). Measuring the estate of a decedent for purposes of taxation by the value of property of which he had wholly divested himself, is taxation of one by reference to the property of another. The power does not make the property the decedent's. As stated by the Court below, the decedent had "finally denuded himself" of the property and could not recall or repossess it. The value of the trust property had no relation to the value of the estate at death. The power reserved had no realizable money value in any way commensurate with the value of the property. Even if the Statute could be construed as a tax upon the extinguishment of the power, it would be unconstitutional because it presents the arbitrary and capricious features condemned in *Heiner* v. *Donnan*. At his death the relation of the decedent to the property was no different from what it would have been if he had never owned the property, and had received the power as donee. All attempts to relate the trust property to the estate, therefore, must be predicated on *past* ownership and the real aim of the Government is to tax *past* gifts *inter vivos*. (*Nichols* v. *Coolidge; Heiner* v. *Donnan*). The inequitable character of the tax is particularly illustrated in this case where the trusts were executed long before the enactment of the Statute. The decedent here not only could not have foreseen the tax burden but he had no power of revocation or repossession by which he could have restored himself to his original position and made provision for the tax subsequently laid upon his estate.

V. Each of the original trusts was irrevocable as and when made. The attempt to revoke Trusts 1 and 2 was therefore ineffectual for that purpose. The indenture of November 27, 1926 therefore accomplished no transfer. Section 302(c) of the Act has no application.

ARGUMENT AS TO CONSTRUCTION.

Section 302(d) of the Revenue Act of 1926 should not be construed as including the property in question.

I.

The tax is laid upon the transfer of the net estate of the decedent at death. It is not laid upon the extinguishment of a limited power.

The tax is imposed by Section 301 of the Act which provides as follows:

> "* * * a tax equal to the sum of the following percentages of the value of the net estate * * * is hereby imposed upon the transfer of the net estate of every decedent * * *."

Only one thing is taxed, *the transfer of the net estate.* It is not a succession tax upon the interests to which the beneficiaries succeed.

Sections 302 and 303 merely furnish the measure of what constitutes the net estate, i. e. the transfer which is taxed. Section 302 defines what is to be included in the gross estate. Section 303 defines what deductions may be made from the gross estate.

Section 301 imposes the tax and the only thing taxed is the transfer of the net estate at death.

That the only thing taxed is a transfer of the net estate at death and that consequently there is to be excluded from the net estate property in which the decedent held no interest or power of enjoyment at death has been repeatedly held by this Court. *Reinecke* v. *Northern Trust Co.* (278

U. S. 339) Cf. *Chase National Bank* v. *United States* (278 U. S. 327); *Tyler* v. *United States* (281 U. S. 497); *Nichols* v. *Coolidge* (274 U. S. 531); *Heiner* v. *Donnan* (285 U. S. 312). This is made clear in the *Reinecke* case (*supra*) at page 348, where the Court said:

> "In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402 (c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401. That doubt must be resolved in favor of the taxpayer."

The provision there under construction was section 302(c) but the holding, that the tax is on the transfer of the net estate, applies equally to section 302(d), because both stand in precisely the same relation to section 301, and the functions of both are identical.

Because the tax is on the transfer of the net estate only, it is necessary, in order to sustain it, to hold that the effect of section 302(d) is to require the addition to the net estate, which is the only thing taxed, of property transferred many years before death and before the enactment of the statute, under the conditions appearing in this case. The tax cannot be merely upon the extinguishment of a limited power, as was suggested by the Court below. As was pointed out in *White* v. *Erskine* (47 Fed. [2d] 1014), the purpose of Congress in enacting Section 302(d) was not to create a new excise tax upon the extinguishment of a power. The function of Section 302(d) is to serve as one of several measuring rods to determine what shall be included in the net estate at death for purposes of taxation. This is the conclusion necessarily reached from a consideration of the scope and purpose of the Act, confirmed by the decisions in the *Reinecke* and other cases.

II.

The value of the property previously transferred should not be included in the net estate transferred at death.

The decedent, Mr. Porter, transferred the property in trust in 1918 and 1919. At that time he divested himself of all title and interest. He could not revoke the instruments, or recover the property or regain the use or enjoyment of it. He reserved power to alter or modify the trust, but expressly provided against the exercise of this power for the benefit of himself or his estate. As to the decedent, the transfers were complete and irrevocable. When the gifts were made, the property ceased to be a part of his estate and could not be brought back into it. It is submitted that there could be no transfer of the property here involved or of any economic interest in it from the decedent at his death.

This is the effect of the holding in *Reinecke* v. *Northern Trust Co.* (*supra*). Two of the seven trusts there under consideration were subject to a power of revocation as long as the transferrer lived. The other five trusts were subject to extensive powers of management and to a power to alter, change or modify but only with the consent of one or more of the beneficiaries. The two trusts were held subject to tax because by the power of revocation, the transferrer had retained, until his death, the right to take back the property, thus making the transfers incomplete, so that the shifting of his interest was completed only at his death. The contrary result was reached as to the five trusts on the express ground that the transfers were complete when made, notwithstanding the reserved powers, so that no interest of the decedent shifted at death and, consequently, there was nothing to be included in the net estate at death, subject to this tax.

In discussing the purpose of the Statute, the Court said (p. 347):

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. (Citing cases). It is not a gift tax * * *. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death."

The Court further indicated the test applicable to these cases (p. 346):

> "*The shifting of the economic interest in the trust property which was the subject of the tax* was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax." (Italics ours.)

The Court pointed out that Section 401 of the Revenue Act of 1921 (which was under consideration in that case and which is the same as Section 301 in this case) attempts to tax only the "net estate of decedents", and that the property required by Section 402 to be brought into the gross estate was either property transferred in contemplation of death or "property passing out of the control, possession or enjoyment of the decedent at his death." The Court then said that in the light of the general purpose of the Statute and the language of Section 401 "explicitly imposing the tax on net estates of decedents" it was at least doubtful whether the trust in that case was intended to be included within the language "to take effect in posses-

sion or enjoyment at or after his death" and that the doubt must be resolved in favor of the taxpayer. It also registered its doubt as to the constitutionality of the Statute if construed as contended for by the Government. The Court emphasizes the "shifting of the economic interest" at death; and cites as a decisive factor the decedent's "power to recall the property and of control over it *for his own benefit.*"

The fact that the decedent retained certain powers over the trust property was not sufficient in itself to sustain the tax; in order to include it in his net estate at death for purposes of a *transfer* tax, it must appear that he had some *economic interest* in the trust property or *some power to recall the property for his own benefit.* The same reasoning is found in *Chase National Bank* v. *United States,* 278 U. S. 327, decided on the same day as the *Reinecke* case and emphasis is there laid upon "the completion of a shifting of the *economic benefits* of the property *which is the real subject of the tax.*"

The holding of the *Reinecke* case, in construing Section 302(c) is equally applicable here in the construction of Section 302(d). Sections 302(c) and 302(d) are coordinate in character and bear the same relation to Section 301, which imposes the tax.

Section 302(c) brings into the net estate transfers of property before death "intended to take effect in possession or enjoyment at or after death." Taken literally, this might seem to include a case where a remainder interest was created to vest in possession at or after the donor's death. This was the situation in the *Reinecke* case, where the Court stated the question in these words (p. 347):

> "But the question much pressed upon us remains, whether, the donor having parted both with the possession *and his entire beneficial interest* in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment

of the statute, is included within its taxing provisions." (Italics ours.)

A similar question is here presented with respect to Section 302(d). Here the donor had likewise parted with the possession and his entire beneficial interest and the question is whether the termination at his death of a power to alter or modify which he could not use for his own benefit is included within the taxing provisions of the Statute.

In the *Reinecke* case the Court answered the question in the negative. It held that the expression in Section 302(c) "to take effect in possession or enjoyment at or after his death" includes no other interests than those "passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Section 401." Similarly here, by a parity of reasoning, the expression in Section 302(d) "subject at the date of death to any change through the exercise of a power to alter, amend or revoke" should be held to include no other interests than those passing from the possession, enjoyment or control of the donor at his death.

The conclusions reached in the *Reinecke* case and the reasoning supporting it apply in the present case with equal force, because, as the Court below has expressed it in this case (Opinion, R., 113), the decedent had "finally denuded himself" of the property. There was nothing to pass from him. The power which he had reserved was a naked and limited power which permitted no interest in or enjoyment of the property by himself. There was no possibility of repossessing or recalling the property or its enjoyment. The power did not pass when he died, but was "obliterated." (*May* v. *Heiner*, 281 U. S. 238.) There was nothing whatever of right or enjoyment which could pass or be transferred when the decedent died.

Tyler v. *United States* (281 U. S., 497) illustrates the point by contrast. There the new accession to the interest of the surviving tenant by the entirety which the death caused, was the counterpart of the interest of the deceased

tenant which he possessed during his life and which terminated with his death, so that what death deprived the one of, it gave to the other, resulting, as a practical matter, in an interest and enjoyment passing from the dead to the living.

It has been pointed out that the *Reinecke* case confines the application of Sec. 302(c) to interests passing from the possession, enjoyment or *control* of the decedent. But it is submitted that the *control* so contemplated was one linking the enjoyment or use of the property to the decedent beneficially, as in the cases of the two trusts held taxable in the *Reinecke* case because subject to a power of revocation, or in the case of *Chase National Bank* v. *United States*, decided at the same time. The ground for this understanding of the *Reinecke* case is, that, in view of the Court's reasoning, the *control* must be one which could relate the trust property to the thing taxed, the decedent's net estate. The Court's argument turns on the fact that the net estate is the only thing taxed, and that it is manifestly incongruous to construe a clause defining the contents of the net estate as intended to include anything not an element of value to the estate at the time of death. Two trusts presented in the *Reinecke* case were taxed. The decedent had neither any enjoyment nor any possession. But he had a power *to revoke*, revesting the property in himself. The two trusts were taxed because of this *control*. In the *Chase National Bank* case, decided the same day, insurance money payable to beneficiaries was held taxable. It was pointed out that, while the decedent, at his death, had neither possession nor enjoyment, he had *control*. He could surrender for cash. He could borrow upon the policies or collect their cash surrender value. His creditors could reach the fund. The Court rested its decisions in these cases on *control*, but a control *beneficial to the decedent*. That, it is submitted, is the character of *control* to which the Court referred in construing Sec. 302(c) as limited to interests passing from the possession, enjoyment, or control of the decedent at his death. In the present case, the

decedent had no such control, and he had no possession and no enjoyment, nor any power to acquire either. Hence, to hold the interests concerned taxable would accomplish precisely the incongruous result repudiated in the *Reinecke* case, of holding that a tax on the net estate passing at death could reach property not in the net estate and having no bearing on its value because out of the decedent's possession, not capable of being enjoyed by him, and excluded from all control by him for his own use or benefit.

The situation may be illustrated by an examination of what happened at death. Before death, the power to change beneficiaries was in the decedent, personal to him. The legal title was wholly vested in others than the decedent and the present and future enjoyment was wholly settled on others than the decedent. The power not only did not permit but plainly prohibited any recall. What effect, then, as respects the property, did death have in these circumstances?

The legal title remained vested precisely as before death. The present and future enjoyment remained settled precisely as before death. No control for the decedent's use was removed as in *Chase National Bank* v. *United States* and in *Reinecke* v. *United States* as to the two trusts. No enjoyment or ownership like that in *Tyler* v. *United States* or even like that in *May* v. *Heiner* passed or ceased. All the interests remained precisely as they were before death except for the fact that they could no longer be disturbed. That fact may have enhanced *their* value but this is not a succession tax.

It may well be contended that Congress has the right to levy an appropriate tax upon this type of transaction. But if Congress desires to levy such a tax, it should impose some form of succession tax upon the beneficiaries who receive the property rather than upon an estate, of which it has long since ceased to be a part; or it should impose a gift tax upon the donor at the time the transfer is made.

As a matter of fact, this is apparently what Congress has done in the Revenue Act of 1932. Section 501 of that

Act makes provision for the Gift Tax and then provides as follows:

> "(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *.
>
> "(c) The tax shall not apply to a transfer of property in trust where the power to *revest in the donor title to such property* is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to said power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift." (Italics ours.)

In brief, the only exception is that of a trust in which the *donor has reserved a power to revest the property in himself.* The Statute, therefore, proceeds upon the theory that a trust in which the donor has no power to revest the property in himself represents a *completed transfer,* as far as the donor is concerned, and is therefore subject to the Gift Tax at the time the transfer is made.

The Government has apparently been not unmindful of the difficulties of an attempt to include in the net estate of the decedent for tax purposes property transferred many years previously and before the enactment of the Statute. It has accordingly labored to spell out a value for the power reserved and its efforts have been rendered more difficult by the necessity of establishing a value commensurate with the value of the property, not at the date of transfer but at the date of decedent's death. It must be obvious that this cannot be so. The power by its express terms excluded the decedent from any interest in or enjoyment of the property. A power to add a beneficiary, or make some other alteration without any right to recover the property, certainly cannot

be considered commensurate in value with a power to revoke or to repossess the property. The very statement of the proposition seems to answer itself.

Let us suppose that in place of Section 302(d) Congress had expressly imposed a tax upon the extinguishment at death of a power of a decedent to substitute one beneficiary (other than himself) for another, and had measured the tax by adding the trust property to that of the estate and directed the payment of the tax out of the estate. Irrespective of considerations of constitutionality, its incongruity is apparent. The irrelevancy of the value of the trust property worth perhaps $10,000,000 as the measure of a tax imposed upon the cessation of a power to say that A instead of B shall enjoy the trust, is manifest when it is considered that the result is a tax of, say, $1,000,000 to be paid, not out of the trust property but out of the estate of the holder of the power. The value of the property subject to the power has no relation to the value of the estate of the holder at his death. Nor in this case, in view of the fact that the decedent has expressly excluded himself from any benefit to himself or his estate, can value be attached to the power which is in any sense the equivalent of the value of the property at the date of death.

Realizing the necessity of establishing a close relationship between the trust property and the decedent's estate, the Government has put forward the extraordinary suggestion that, in spite of the fact that the trust instrument expressly provided that the transferrer could not exercise his power to name himself or his estate as beneficiary, nevertheless he might, in the words of the Court below, "revoke the original limitation and select a facile beneficiary, might even make an agreement beforehand that the substitute should unite with him to terminate the trust, as is possible in New York, when all the beneficiaries are in being."

It is to say the least doubtful, as indeed was questioned by the Court below, whether any such fraud upon the power would be permitted, or whether the transferrer would be allowed to exercise the power for his own benefit and to

the injury of the beneficiaries, in violation of his own agreement. The rule is thus stated in Bispham's Principles of Equity, 9th Ed., Sec. 256:

> "If a power is not exercised in good faith, and for the purposes for which it was created, its exercise will be deemed fraudulent in equity, and will be set aside upon a bill filed by a party in interest. A case in which a power is thus improperly exercised is said to be a case of 'a fraud upon the power'. The plainest case of a fraud on a power is where the power is exercised for the personal advantage of the appointor."

Furthermore, even if this extraordinary procedure were possible under the laws of New York, it would hardly constitute justification for construing Section 302(d) in the manner suggested, or as applicable to other jurisdictions. It should be noted that the New York Appellate Division decisions supposed to support this procedure (Opinion, R. 112) are cases where there was no limitation on the power to change beneficiaries so that beneficial appointment to the settlor himself would not have violated the rights of existing beneficiaries.

We submit that Section 302(d) should not be construed to include in the net estate at death the value of the property previously transferred in trust because the statute includes no other interests than those passing from the possession, enjoyment or control of the decedent at his death and so taxable as transfers on death under Section 301; *Reinecke* v. *Northern Trust Co.* (*supra*); that there was no transfer or shifting of interest from the decedent at death, nor did any power cease under which the decedent prior to his death might have secured for himself any economic benefit in the property; that the construction of Section 302(c) in the *Reinecke* case is equally applicable to Section 302(d) in this case. That construction, unlike the position taken by the Court below, is consistent with the repeated statements of this Court with respect to the various provisions of Section 302, that *the passing of an economic*

interest from the decedent is the real subject of the tax (cf. *Nichols* v. *Coolidge*, 274 U. S. 531 at p. 541; *Chase National Bank* v. *United States*, 278 U. S., 327 at p. 338; *Reinecke* v. *Northern Trust Co.*, 278 U. S., 339 at p. 346).

We know of no case in which previous transfers have been held taxable, in which the decedent did not hold until death some economic interest in the property or some power to recall or control for his benefit an economic interest. On the other hand, in *May* v. *Heiner* (281 U. S. 238) and *Burnet* v. *Northern Trust Co.* (283 U. S. 782) where the decedent retained the use of the property for life, the property was held to be not subject to tax.

III.

The wording of Section 302(d) is peculiarly susceptible of the construction applied to Section 302(c) in Reinecke vs. Northern Trust Company. Such a construction avoids arbitrary and unreasonable results, which are the inevitable consequence of the contention of the Government.

Section 302(d) provides:

> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at * * * his death to *any change* through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke," etc. (Italics ours.)

What is intended by the words "any change"? Do they mean (1) any change whatever, however slight or limited in character, or (2) any change, without limitation, which the donor chooses to make? Surely if the purpose of the Statute is to bring into the decedent's net estate for taxation at death the value of property transferred years

before, it cannot be made to depend upon the power to make some trivial or inconsequential change. Thus in the present case, if the sole power reserved had been to provide for the accumulation of income of infant beneficiaries or that the life tenant should receive the principal at the age of 35 instead of 30, a contention that tremendous amounts of tax should be based upon such trivial considerations would be open to a charge of capriciousness.

If, on the other hand, "any change" means "any change without limitation", then the provision contemplates a case where the donor can make any change he chooses, including one for his own benefit or that of his estate. In that case he holds a potential *interest* which passes at his death and a control of the enjoyment for his benefit which ceases at his death. For an unlimited power is an interest, since it is a general power to dispose and the equivalent of a fee (*Bullen* v. *Wisconsin*, 240 U. S. 625; Sugden, Powers, 8th Ed. p. 396).

That the latter interpretation is the one intended is evidenced by the Report of the Ways and Means Committee of the House (68th Congress) recommending enactment of the original Section 302(d) in the 1924 Revenue Act (Report 179, p. 65) as follows:

> "This provision is in accord with the principle of Section 219 (g) of the Bill which taxes to the Grantor the income of a *revocable* trust."

The Section 219 (g) referred to reads:

> "Where the grantor has the power to revest in himself title to any part of the trust then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

It is significant in this connection to note that the wording of Section 302 (d) is

> "subject at * * * his death to any change through the exercise of a power, * * * to alter, amend or *revoke* etc."

If "alter" or "amend" relate to any trifling change, their intimate coupling with "revoke" would be inappropriate. The principle of *noscitur a sociis* is applicable. The association of these words with the word "revoke", taken in conjunction with the Report of the Committee accompanying the proposed bill, quoted above, clearly indicates the character of the alteration or amendment which Congress had in mind, i. e., the equivalent of revocation.

The reasonable and logical construction to be placed upon Section 302 (d) is, therefore, that it refers to a power, sufficiently unlimited that the donor might have taken advantage of it for his own benefit, for the following reasons:

1. It harmonizes the provision with the scope and purpose of the Act, to tax the transfer of the net estate, avoiding the incongruity pointed out in the *Reinecke* case of bringing into the measure of a tax on a particular transfer the value of property not affected by the transfer (278 U. S., at p. 348).
2. It gives proper significance to the phrase "to alter, amend or *revoke*".
3. It avoids arbitrary and unreasonable results in practice.

Until the decision in this case, the various Appellate Courts had uniformly construed Section 302(d) in the manner for which we contend. Thus the case of *Brady* v. *Ham* (45 Fed. [2d] 454) was in all respects similar to the case now under consideration. The power reserved in that case was as follows:

> "Said Elizabeth S. Haynes shall have full power to make any additions to the trust property and to change and alter any or all of the trusts herein set forth, to name any beneficiaries other than those above named *except herself*, whether by way of addition or substitution * * * ."

The Circuit Court of Appeals for the First Circuit, after reviewing the various Supreme Court decisions, said:

> "The test, therefore, is whether the donor or decedent has reserved to himself control over the

economic benefits or enjoyment of the trust property. If the *economic benefits* passed under the trust deed from the decedent's control beyond recall, there can be no transfer tax.

"As the Court said in *May* v. *Heiner*, 281 U. S. 238, 50. S. Ct. 286, 287, 74 L. Ed. 826, 62 A. L. R. 1244, 'At the death (of the decedent) no interest in the property held under the trust deed passed from her to the living.' So in the case of the decedent in the instant case, the title thereto had been definitely fixed by the trust deed. She could not take it back either directly or indirectly.

"*The decedent, Elizabeth S. Haynes, by her declaration of trust expressly deprived herself of the enjoyment of all economic benefits in the trust estate. While she might control the final disposition of it so far as the beneficiaries were concerned, she could not restore to herself any beneficial enjoyment of it.* She reserved no power of revocation as in the first 'two trusts' in the *Reinecke* case. *Bath Sav. Institution* v. *Hathorn*, 88 Me. 122, 33 A. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; *Keyes* v. *Carleton*, 141 Mass. 45, 49, 6 N. E. 524, 55 Am. Rep. 446; *Thurston, Petitioner*, 154 Mass. 596; 29 N. E. 53, 26 Am. St. Rep. 278; *Sands* v. *Old Colony Trust Co.*, 195 Mass. 575, 577, 81 N. E. 300, 12 Ann. Cas. 837. So far as any economic benefits of the trust estate were concerned, they passed to the trustees at the time of the execution of the declaration of trust. The enjoyment of them may not have been definitely settled on the beneficiaries until her death, and the beneficiaries may have been subject to a succession tax, but the right of enjoyment of any economic benefits thereof irrevocably passed from the decedent in 1911. To hold that such property was subject to a transfer tax would amount to what the Supreme Court had termed in the above-cited cases as an arbitrary and capricious exercise of legislative power.

"This test established by the Supreme Court has been since followed in the Circuit Court of Appeals in the Third Circuit in *McCaughn* v. *Carnill*, 43 Fed. (2d) 69, and in the District Court for the District of Massachusetts in *Erskine* v. *White*, 43 Fed. (2d) 765, decided October 1, 1930."

The case of *White* v. *Erskine* subsequently came before the Circuit Court of Appeals, which thereupon examined the question anew. (47 Fed. [2d] 1014.) After referring to the various sub-sections of Section 302, the Court said (p. 1016):

> "In (a) it is expressly limited to the extent of the interest therein of the decedent at the time of his death. This limitation in view of the nature of the tax, viz., a tax on the right to transfer property at death, must, in view of the opening words of each subdivision, be applied throughout the section. In other words, if there is no property or beneficial interest in property passing from the decedent at death, there can be no tax under this act.
>
> * * * * * *
>
> "The government now contends in effect that by subdivision (d) Congress has undertaken to impose a new form of excise tax, viz., a tax on the power to alter or revoke before death a trust created by the grantor, whether the power be of a general or limited nature. We do not think Congress intended by the addition of subdivision (d) to add a new form of tax. It was only 'to the extent of the interest' of the decedent in the trust fund, and at his death, that subdivision (d) adds anything to the value of the gross estate. If the decedent had no beneficial interest in the trust fund at his death, under the construction of the Supreme Court in the above-cited cases, there was nothing transferred from him at death within the meaning of section 301, which imposes the tax.
>
> "The report of the Committee to the House of Representatives, 68th Congress, Rep. 770, p. 65, subdivision (d), clearly indicated the intent of Congress, and is in harmony with section 301 and the other subdivisions of section 302.
>
> "The committee's report was as follows: 'This provision is in accord with the principle of Sec. 219(g) of the bill which taxes to the grantor the income of *revocable trusts.*' (Italics supplied.)
>
> "In other words, where a grantor, either alone or in conjunction with anyone not a beneficiary under the trust, has retained 'the power to revest in himself title to any part of the trust', to quote from

> section 219(g), then the body of the trust at the death of the decedent may be included in the value of the gross estate; but where the decedent has no such power except by the consent of an adverse party as one of the beneficiaries, or as in this instance of the trustee for the beneficiaries, the right of revocation is gone from the donor and also all beneficial interest for taxing purposes under section 301 of the act.
>
> "To hold that Congress under subdivision (d) intended under the guise of a tax on the transfer of property at death to impose a tax solely on a limited power of alteration of a trust, or a limited power of appointment under it, would be contrary, not only to the spirit of the act, but the express terms of section 301, Lesser, Executrix, *v.* Burnet, Com., supra; Fidelity-Phila. Trust Co. *v.* McCaughn (C. C. A.) 34 F. (2d) 600, 604, and so doubtful a construction that the contrary intent should be resolved in favor of the taxpayer, Gould *v.* Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211."

To the same effect is the case of *Cover* v. *Burnet* (53 Fed. [2nd] 915) decided by the Court of Appeals of the District of Columbia.

It is both logical and reasonable in determining the test of liability for the Federal Estate Tax, to hold that "any change through the exercise of a power" should be interpreted to mean any change broad enough to permit the maker or his estate to benefit in the property. This makes possible an interest or its equivalent in the donor. In that event the addition of the property to his estate for purposes of taxation is directly in line with the purposes of the Act.

If, however, the wording is to be interpreted to mean "any change whatever", however slight, burdensome taxation may be made to depend upon the merest trifles, and there is at once created the possibility of arbitrary and unjust exactions.

Thus, the reservation of a power to direct accumulation of income or to postpone the payment of principal might render a transfer taxable. A donor might make a trust for his children which would be free of tax but if he reserved the right to make provision for an after-born child, the property would be rendered taxable, even though he expressly excluded himself and his estate from any benefit. A similar result would follow if he merely reserved the right to alter the division of principal or income among his children without adding or changing any beneficiary.

These cases and countless others that could be readily imagined illustrate the striking tendency of Section 302(d) to operate in an unjust and unreasonable manner, if construed as the Government contends. This tendency is greatly magnified if the construction be applied, as in this case, to trusts created before the enactment of the statute.

If, however, power to make "any change" means power without limitation, including change for the benefit of the donor or his estate, these arbitrary incidents are avoided and the tax is laid upon a transfer which can be said to have some relation to the net estate.

For these reasons we submit that Section 302(d) should be construed to include only those interests subject to powers to change the enjoyment by alteration, amendment or revocation, "passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Section 401". *Reinecke* v. *Northern Trust Co.* (*supra*).

ARGUMENT AS TO CONSTITUTIONALITY.

IV.

As applied to the transfers in this case, Section 302(d) would be confiscatory and unconstitutional, if construed as the Government contends.

We submit that Section 302(d) would be unconstitutional, as applied to this case, if construed as the Government contends. In *Heiner* v. *Donnan* (285 U. S. 312) it was held that an attempt to measure a tax on one person's property by reference to the property of another was in violation of the Fourteenth Amendment. The Court quoted from *Hoeper* v. *Tax Commission* (284 U. S. 206) as follows:

> "We have no doubt that because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment * * *."

Therefore, if the trust property was not in some real sense the decedent's at his death, the introduction of its value into his net estate for purposes of taxation is clearly contrary to the constitutional provision.

As has already been pointed out, the decedent had divested himself of all title and interest. He could not recover the property or regain the use or enjoyment of it. When the gifts were made the property ceased to be a part of his estate and could not be brought back into it. His only relation to the property consisted of the reserved power to alter or modify but this he could not exercise for his own benefit.

As the Court below expressed it, decedent had "finally denuded himself" of the property (Opinion, R., 113). In this respect the present case presents a sharp contrast with such cases as *Chase National Bank* v. *United States,*

Reinecke v. *Northern Trust Co., Tyler* v. *United States,* or even *May* v. *Heiner.* In those cases, the decedent had reserved for himself till death either the possession or enjoyment or a control equivalent to the enjoyment and his estate might be said to be increased by the value of the possession or enjoyment. In this case, the decedent had finally denuded himself and that of which he has denuded himself cannot be brought back into the estate.

What the Circuit Court of Appeals has done, after admitting that the decedent had "finally denuded himself", is to impose upon the estate a tax upon the advantage accruing to the beneficial interests through the removal of the menace inherent in the power. This would turn this transfer tax into a succession tax. It would impose upon the estate a tax based upon the advantage accruing to the beneficiaries of the trust and would measure it under a sliding scale of rates based upon the value of the estate and of the trust property which formed no part of the estate. To tax in the decedent's estate the full value of property of which he had finally denuded himself because of the advantage accruing to the trust beneficiaries through the extinguishment of a power is manifestly arbitrary and capricious. (*Knowlton* v. *Moore,* 178 U. S. 41; *Nichols* v. *Coolidge; Heiner* v. *Donnan.*)

The actual relation of the decedent to the property *at his death* was no different from what it would have been if he had never owned the property and had received the power as donee. It would not be thought, of such a donee, that the trust property was in any sense his. The claim of right to tax, is therefore predicated on the *past* ownership, and has regard to the *past* transfers. Thus the real aim of §302(d), as the government construes it, is to tax past gifts *inter vivos.* This is unconstitutional under *Nichols* v. *Coolidge,* because all the transfers were made before the original enactment of §302(d) in the 1924 Revenue Act.

This proposed taxation with reference to *past* ownership is also unconstitutional under *Heiner* v. *Donnan* irrespective of priority in time as between transfers and legislation, because *Heiner* v. *Donnan* holds it is confiscatory to

tax transfers retrospectively by bringing the value into the measure of the estate at death, for these reasons (285 U. S. p. 332):

> "If it be a gift tax, it, nevertheless, is based, not upon the transfer of the gift, but upon the transfer of the estate; and upon the value of the estate, and not that of the gift. Obviously these are bases having no relation whatever to the gift. Moreover, the value of the gift is not to be determined as of the time when made, but, considered as a part of the estate, is to be fixed as of the date of the decedent's death—a condition so obviously arbitrary and capricious as, by itself, to condemn the tax, viewed as a gift tax as violative of due process. It is to be paid by the beneficiaries of the decedent, although it is impossible for them to share in the gift which has passed beyond recall. It is, therefore, a contribution to the government exacted of one person based *pro tanto* upon the wealth of another."

These same reasons refute the suggestion of the court below that the tax is on the extinguishment of the power. If the act could be so construed the case might be differentiated from *Nichols* v. *Coolidge* on the ground stated in *Reinecke* v. *Northern Trust Co.* Nevertheless, the Court of Appeals, in this case, gave recognition to the element of retrospection and sought to escape the consequence by arguing that the decedent could have relinquished the power after the enactment (Opinion, R., 114), a theory suggestive of laying a tax on a failure to make good one's escape. One is led to speculate in passing what the situation might be if in the interim the donor had become incompetent or otherwise incapacitated. But even if this should be thought to obviate objections under *Nichols* v. *Coolidge*, it obviates none of those pointed out in *Heiner* v. *Donnan*. That the power might have been relinquished does not alter the fact that the tax, viewed as one on the gifts to the trustee, is based, not on the transfer of the gifts, but on the transfer of the estate, and on the value of the estate and not on that of the gifts. It does not alter the fact that the value of the gifts is not determined as of the time when made, but, con-

sidered as a part of the estate, is to be fixed as of the date of the death, or the fact that the tax is to be paid by the beneficiaries of the decedent, although it is impossible for them to share in the gift which has passed beyond recall.

The opinion below makes no reference to *Heiner* v. *Donnan*. This may be accounted for by the court's belief that "*Congress may measure an excise as it will.*" (Opinion, R., 114.) But it is submitted that this is not the law and the present case is an excellent example. In *Heiner* v. *Donnan* an arbitrary *measure* for taxation was condemned, and the court, at page 326 of the 285th U. S., said:

> "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment is settled. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24-25; *Tyler* v. *United States, supra*, p. 504."

To measure an excise on extinguishment of a limited power by the value of the property and not by the value of the power, basing it on the value of the estate and not on that of the power results in exactly the kind of arbitrariness condemned by this court in the passage quoted above on page 30. It presents, in this case, a tax of thousands of dollars on the extinguishment of a power without realizable money-value, measured by the value of property which the holder of the power could not touch in any way beneficial to himself. In short, it taxes him exactly in the same way as if he were the owner of the fee.

The difficulty of establishing a value of the power in the hands of the decedent in any way commensurate with the full value of the property is well illustrated by the extraordinary suggestion of the Government to which reference has been made on page 19. It is significant that resort must be had to a devious and questionable scheme to defeat the express terms of the trust in order to assign a value to the power and spell out for the decedent a control of the property for his own benefit.

The inequitable character of the tax is particularly illustrated in this case where the trusts were executed long before the enactment of the Statute. In *Milliken* v. *United States* (283 U. S. 15, at p. 20) this Court said:

> "This Court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause."

This result was indicated if the tax burden "could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax." *Nichols* v. *Coolidge* (274 U. S. 531); *Untermyer* v. *Anderson* (276 U. S. 440.)

These trusts were made in 1918 and 1919, several years before the enactment of the provisions of the statute (Sec. 302-d), under which it is now proposed to include the property then transferred in the decedent's taxable estate. It is the contention of the Government, however, that the continuation until death of the power to alter or modify renders the property taxable and reliance is placed upon the case of *Reinecke* v. *Northern Trust Company*, in which it was held that a power of revocation rendered the property taxable, even though the instrument reserving the power had been executed prior to the passage of the statute.

A vital difference is however evident in the two situations thus presented. In the case of a power of revocation, while a grantor who made a trust prior to the enactment of the statute could not have understood or foreseen the burden of the tax, nevertheless, after the enactment of the statute, he possessed full power to repossess the property previously transferred and could restore himself to his original position, and therefore could make provision against the tax which would ultimately fall upon his estate. The option would still be open for him, and he would be free to act accordingly.

In the present case, however, the situation was wholly different. The decedent, when he made the transfers sev-

eral years before the enactment of the statute, not only could not have foreseen the tax burden, but by the terms of the transfers, he not only divested himself of the property but he made it impossible to repossess the property either for himself or his estate. When, therefore, the statute was enacted it was beyond his power to restore either himself or his estate to a position where the tax could be paid out of the property transferred. The theory of the tax is that the property previously transferred constituted a part of the decedent's net estate. And yet in this instance by no possibility could the property previously transferred be included among the assets from which the tax could be paid. To hold thus produces results which are arbitrary and unreasonable (*Heiner* v. *Donnan*) and in some conceivable circumstances may be almost fantastic.

To illustrate, let us suppose that many years prior to the enactment of the statute, an individual has transferred in trust one half of his estate under conditions similar to those in this case. Let us suppose that he has died during the past year. In the interim, the estate retained by him has suffered a severe shrinkage in value. If the value of the property transferred years previously be included in computing his net estate, the tax levied thereon would wipe out the entire estate remaining in his possession at his death. And yet he is and at all times has been powerless to recall the property transferred for the purpose of meeting the tax subsequently laid thereon by the government.

It is the arbitrary and burdensome character of this result which is commented on in *Nichols* vs. *Coolidge* (274 U. S. 531, at p. 542) as follows:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real

estate, transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers*, 12 Fed. (2nd) 625."

V.

Each of the original trusts was irrevocable as and when made. The attempt to revoke Trusts 1 and 2 was therefore ineffectual for that purpose. The indenture of November 27, 1926, therefore accomplished no transfer. Section 302(c) of the Act has no application.

It is entirely clear that the original trusts made in 1918 and 1919 were irrevocable. The decedent reserved no power to revoke. The only powers he reserved were to modify or alter and these powers were limited to modifications or alterations not in favor of himself or his estate. Aside from these powers, the trusts were all ordinary conveyances in the usual form, which disposed of the entire right, title, and interest in the property. It is well settled that transfers of this character are irrevocable and that attempted revocations are ineffectual (*Garner* v. *Germania Life Insurance Co.*, 110 N. Y. 266; *Roberts* v. *Taylor*, 300 Fed. 257; *Nearpass* v. *Newman*, 106 N. Y. 47; *McPherson* v. *Rollins*, 107 N. Y. 316; *Levett* v. *Farnham*, 169 Mass. 1; *Dickey* v. *Goldschmidt* [N. Y.] 60 Misc. 258).

The reserved powers could not be construed as a power of revocation, for in fact they prohibit revocation (R., 45) thus:

> "* * * but this power to modify or alter is not intended and shall not be construed to include the right to the donor to make such modification or alteration in his own favor or in favor of his estate but

shall apply only so far as the interests of third parties are concerned."

Thus revocation was not legally possible and the attempted revocations were ineffectual. There was no transfer or delivery of the trusteed property which continued to remain in the possession of the original trustee. The instrument of November 27, 1926, conveyed nothing nor did it effect any transfer. At most its effect was merely to modify the terms of the original Trusts Nos. 1 and 2, which otherwise continued in full force and effect.

* * * * *

Since the transfers in this case were irrevocable it is controllingly settled by *Reinecke* v. *Northern Trust Co.* that the provision of section 302(c) bringing into the gross estate transfers intended to take effect in possession or enjoyment at or after death has no application.

CONCLUSION.

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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